

No. A03-1635 and A04-205

**STATE OF MINNESOTA
IN SUPREME COURT**

KELCI STRINGER, individually and as Personal Representative of the Estate of Korey Stringer, and as Trustee for the Heirs and Next-of-Kin of Korey Stringer, and KODIE STRINGER, a Minor, through his Parent and Natural Guardian, Kelci Stringer, and CATHY REED-STRINGER and JAMES STRINGER,

Plaintiff/Appellants,

v.

FRED ZAMBERLETTI and PAUL OSTERMAN,

Defendants/Respondents,

and

MINNESOTA VIKINGS FOOTBALL CLUB, LLC, DENNIS GREEN, MICHAEL TICE, and CHUCK BARTA, and W. DAVID KNOWLES, MD and MANKATO CLINIC, LTD. and SHELDON BURNS, MD, and DAVID FISCHER, MD, and ORTHOPAEDIC CONSULTANTS, PA, and EDINA FAMILY PHYSICIANS, a professional association, and JOHN DOES and JOHN DOES 6 THROUGH 30, Natural Persons or Entities Whose Names or Identities are Unknown to Plaintiff,

Defendants.

BRIEF OF RESPONDENTS

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LEGAL ISSUES

1. This Court has described the standard for “gross negligence” as “with very great negligence,” “with negligence of the highest degree,” and “without even scant care.” Do the undisputed facts here—where the defendants helped Korey Stringer to a cool trailer, gave him water and other care, sought to treat his hyperventilation, called for medical help, and helped attend him in the ambulance—permit a jury to find such extreme conduct?

The trial court held that plaintiffs failed to raise a genuine issue of material fact in support of their gross negligence claim, and the Court of Appeals affirmed.

State v. Chambers, 589 N.W.2d 466 (Minn. 1999)

State v. Meany, 262 Minn. 491, 115 N.W.2d 247 (1962)

State v. Bolsinger, 221 Minn. 154, 21 N.W.2d 480 (Minn. 1946)

Minn. Stat. § 176.061

2. This Court has held that Minnesota’s Workers’ Compensation statute permits a plaintiff to recover damages for the gross negligence of a co-employee only where the co-employee owed the plaintiff a personal duty, as opposed to a general administrative duty for some function of the employer. Did Zamberletti’s and Osterman’s efforts to help the ailing Stringer, which were part of their duties as Vikings trainers, impose such a personal duty on these remaining two defendants?

The trial court held that defendants Zamberletti and Osterman owed no personal duty to Korey Stringer, only those duties that arose because of the defendants’ employment by the team. In dicta, the Court of Appeals opined that these defendants owed Stringer a personal duty.

Wicken v. Morris, 527 N.W.2d 95 (Minn. 1995)

Dawley v. Thisius, 304 Minn. 453, 231 N.W.2d 555 (1975)

Wicklender v. Rarick, 2003 WL 282384 (Minn. App. Feb. 5, 2003)

Minn. Stat. § 176.061

PREFACE CONCERNING PLAINTIFFS' STATEMENT OF FACTS

Defendants acknowledge that this Court must view the facts in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). Nevertheless, the facts are to be stated "fairly, and with complete candor," Minn. R. Civ. App. P. 128.02, subd. 1(c). A statement of facts must include the evidence that undercuts a party's position as well as that which supports it. *See Truesdale v. Freidman*, 267 Minn. 402, 406, 127 N.W.2d 277, 280 (1964). Plaintiffs' brief here overlooks this admonition and omits a number of facts directly material to the present appeal.

In addition, despite Rule 128.03's requirement that a party to cite to the "specific pages" in the appendix or record "[w]henver a reference is made in the briefs to any part of the record," plaintiffs' chart of "facts" on pages 37-42—the core of plaintiffs' record-based argument—provides no specific record citations whatever, relying instead on general citations to plaintiffs' own incomplete Statement of Facts. This strategy makes directly checking the accuracy of plaintiffs' characterizations of the evidence in their argument very difficult and time-consuming.

This combination of omission and unattributed characterization results in a one-sided and incomplete impression of the underlying facts. For example, plaintiffs' chart states (without record citation) that Stringer "stumbled 40 to 50 yards" to Big Bertha (the large blocking dummy) and "took a feeble and uncoordinated swing" at the dummy. Pl. Br. at 37, 38. In fact, no record testimony ever used the words "stumbled," "feeble," or "uncoordinated" in describing Stinger at this point. On the contrary, the actual testimony

was that Stringer and Cory Withrow “walked” and “jog[ged]” to Big Bertha, *see* Withrow Depo. 36:19-22, 40:12-16 (RA231, 235)¹, and that Stringer “hit Big Bertha, he pushed it all the way through. He walked through, after he hit it, and walked towards the trailer.” Withrow Depo. 50:23-51:1 (A252).

The brief’s omissions are as troubling as the exaggerations. For example, although plaintiffs’ brief stresses that Paul Osterman never used a cell phone to call Fred Zamberletti or 911 for help (insinuating that he sought help from neither), it omits the undisputed fact that Osterman asked a student intern to personally go get Zamberletti to help care for Stringer and that Osterman called Gold Cross ambulance service directly to aid Stringer when an emergency situation presented itself. Osterman Depo. 72:14-17, 84:13-21 (RA171, 177). Plaintiffs also fail to note the undisputed testimony of players who were immediately around Stringer as he lay on the ground after practice, none of whom believed that their friend and teammate of many years was in any serious distress. Birk Depo. 116:6-11 (RA80); Withrow Depo. 108:6-14 (RA240); Dixon Depo. 121:3-21 (RA107); Tice Depo. 229:6-11 (RA226).

Finally, at least one of plaintiffs’ “facts” appears to have been created for this brief.

Plaintiffs assert: “The collapse of an athlete usually is a sign of advanced heat stroke, requiring immediate evaluation for cause.” Pl. Br. at 4 (citing A323; 452-53). In fact, neither of the experts plaintiffs cite makes any such dramatic and surprising statement.

¹ “RA ___” citations are to Respondents’ Appendix.

Plaintiffs appear to have combined separate portions of two experts' opinions to arrive at their own unique assertion.²

STATEMENT OF FACTS

A. The 2001 Vikings Training Camp

With respect to the care provided to the athletes, the quality of the Minnesota Vikings' 2001 training camp was comparable to and even exceeded other NFL camps.³ See Susan Hillman Affidavit ¶¶ 4-10 (RA283-85). The Vikings' athletic training staff and its procedures have been recognized as some of the best in the NFL. See RA384 (noting the Vikings' athletic training staff was named the NFL Athletic Training Staff of the year in 1997).

In 2001, Head Trainer Chuck Barta arranged for the placement of an air-conditioned trailer immediately adjacent to the practice fields, for use by the training staff in examining and treating players and allowing them immediate access to a cool environment. Barta Depo. 212:21-213:12, 214:1-8 (RA51-53). Both certified and intern athletic trainers were on the field throughout the entire practice. These trainers followed

² The affidavit of Dr. William Roberts (A323) states: "The collapse of an athlete should trigger an evaluation for cause." The article by Dr. E. Randy Eichner (A451-453) states: "Advanced features [of heat stroke] are collapse with wet skin, core temperature over 106-107° F, and striking CNS changes—delirium, stupor, seizures, or coma."

³ The general conditions at the Vikings 2001 camp do not bear on the claims against Zamberletti and Osterman, but relate instead to the employer's nondelegable duty to create a safe work environment, for which no employee may be held personally liable. See generally *Wicken v. Morris*, 527 N.W.2d 95 (Minn. 1995). Nevertheless, because plaintiffs' brief emphasizes the camp conditions, defendants offer this description to complete the picture.

the players and coaches through drills with portable water caddies so that water was constantly available to players. Barta Depo. 83:3-18 (RA43); Birk Depo. 102:22-25 (RA77); Dalton Depo. 97:11-98:17 (RA82-83). Both trainers and coaches encouraged players to drink whenever they were not actively in a drill. *See, e.g.*, Barta Depo. 202:23-204:16 (RA48-50); Green Depo. 96:16-98:20 (RA114-16); Tice Depo. 200 (RA218); Birk Depo. 32-33, 34:12-35:18 (RA65-68). The training staff also made electrolyte supplements available to players to help them avoid problems with dehydration. *See* Barta Depo. 182:23-183:25 (RA47-47); RA382 (signage from locker room). Per Vikings policy, at least one certified trainer always remained on the field after practice until the last player left. Barta Depo. 77:3-7 (RA42).

In addition, for each of the over 30 years the Vikings ran training camp in Mankato, the team retained Dr. W. David Knowles, a Mankato physician, to visit camp regularly and otherwise be available to check on players as requested. Knowles Depo. 14:10-15:3 (RA135-36); Barta Depo. 124:3-7 (RA45).

On Sunday evening, July 29, the night before camp started, Chuck Barta addressed the team and spoke on various subjects, including the importance of hydration and of replacing lost fluids. Barta Depo. 202:23-204:16 (RA48-50); RA377 (Barta's notes outlining the topic areas covered at this first team meeting). On Monday, July 30, the Vikings brought in a physiologist to address the players on the importance of nutrition and hydration. Dalton Depo. 100:16-101:1 (RA84-85); Green Depo. 60:7-24 (RA110).

At the beginning of camp, the Vikings required players to record their weights on a weight chart. The trainers instructed the players to weigh in at the beginning and end of

each practice day,⁴ and head athletic trainer Chuck Barta reviewed each player's weight charts daily to look for excessive weight loss. Barta Depo. 203:10-15, 227:25-230:10 (RA49, 56-59). Barta also checked the heat index daily before practice and shared this information with Dennis Green, so that Coach Green could have the information in considering whether to modify practice in light of weather conditions. Barta Depo. 121:13-21 (RA44); Green Depo. 61:17-63:2, 186:15-16 (RA111-13, 117).

Coach Green confirmed that he shortened practice for the team on July 30, 2001. Green Depo. 55:4-16 (RA109). On Tuesday, July 31, Green conferred with head athletic trainer Chuck Barta on the heat and humidity and "took that into account" with respect to what the team would do during practice. *See id.* 61:17-63:2 (RA111-13); *see also id.* 186:15-16 (RA117) ("I always take into consideration what the heat index was."). In addition, Stringer's offensive line coach, Mike Tice, cut down the tempo of certain drills during the July 30 morning practice in order to give the players more ability to rest and get water. Tice Depo. 107:3-14 (RA211). During Monday afternoon practice, Tice eliminated the hardest part of a sled drill in light of the heat. *Id.* 113:17-23 (RA212).

⁴ According to the weight chart, Stringer weighed himself as recommended in the morning and afternoon on Monday, and on Tuesday prior to practice. Barta Depo. 259 (RA60); RA378 (Stringer weight history).

B. Korey Stringer

Korey Stringer was a beloved and valued member of the Minnesota Vikings Football Club on both a personal and professional level. *See, e.g.*, Zamberletti Depo. 254 (RA273); Tice Depo. 61-62 (RA205-06). A veteran offensive lineman for the Minnesota Vikings who had made the Pro Bowl the previous season, Stringer was entering his seventh training camp with the team in 2001. There is no question that Stringer knew this team's training camp procedures and practices well.

There is also no question that Korey Stringer struggled with practices at the beginning of nearly every training camp, regardless of how hot it was. It is undisputed that Korey Stringer had a history, not of heat illness, but of vomiting and not practicing on par with the other players for the first few days of camp. This fact was reported by coaches, trainers and players who had known him for years, including coaches Mike Tice and Dean Dalton, players Matt Birk, David Dixon and Corey Withrow, and trainers Zamberletti and Osterman. *See* Tice Depo. 46:25-47:15, 63:5-24, 66:11-23 ("I can't remember the first time, since I became a line coach, in the first four practices, the first two days, where one of those periods Korey was totally up to par with the rest of the group."), 69:11-70:23 (RA203-04, 207-09); Birk Depo. 53:14-15 (RA71); Dixon Depo. 33:2-7 (RA95); Withrow Depo. 27:6-19 (RA230); Osterman Depo. 184:7-18 (RA190); Dalton Depo. 170:2-25 (RA93); Zamberletti Depo. 206:7-25 (RA269). The sight of Stringer vomiting on the field in the first few days of camp was nothing unusual to anyone who knew Stringer. Tice Depo. 46:25-47:9, 69:11-70:11 (RA203-04, 209-10)

(indicating Stringer had trouble every year because he would not show up to camp properly conditioned and because he got himself too “keyed up” at the beginning of camp); Kelci Stringer Depo. 48:16-49:4 (RA200-01) (answering “yes” to the question of whether Stringer “would throw up either in the first or second day of training camp each and every one of those years”).

1. July 30, 2001.

On this first day of practice, Korey Stringer presented with an upset stomach before going on the field or working out in heat. *See* Kelci Stringer Depo. 48:7-15 (RA200); Tice Depo. 66:11-23 (RA208). When Chuck Barta asked Stringer about his symptoms, Stringer replied it was his typical nervous stomach, and Barta gave him Tums. Barta Depo. 29:7-10, 30:6-31:4 (RA23, 25). On July 30, Stringer completed the morning practice without incident. During the afternoon practice, Coach Tice saw Stringer vomit as the players stood in the huddle during period 3. He asked Stringer if he was okay, Stringer confirmed he was fine, but had an upset stomach. The period continued without incident and Tice “kept an eye” on Stringer.

During the next period, period 4, Coach Tice again stood with the players in a huddle formation and saw Stringer vomit for a second time. At this point, although he did not attribute Stringer’s vomiting to the heat,⁵ he pulled Stringer out of practice and called for Head Athletic Trainer Chuck Barta. Tice Depo. 125:5-129:3 (RA213-17).

⁵ Coach Tice confirmed that Stringer often vomited at the start of training camp, heat or no. *See, e.g.* Tice Depo. 66:11-23 (RA208).

Barta walked towards the huddle as Stringer came out of the huddle, and at that point Barta witnessed Stringer vomit. When Barta reached Stringer, he stood with him on the side of the field and conducted an assessment of Stringer, observing his body language, feeling his skin, and asking him about his symptoms. They engaged in a discussion and Stringer indicated he was anxious and had an upset stomach. Barta Depo. 37:7-39:19, 40:12-45:7 (RA26-34). Barta stood with Stringer a bit longer and continued to monitor him. Stringer then vomited again and Barta removed Stringer from practice for the day, over Stringer's objection. *Id.* 29:22-30:2, 45:8-12 (RA23-24, 34).

Barta took Stringer to the on-field athletic trailer so that Stringer could relax and cool down. *Id.* 45 (RA34). At this point, Stringer had only participated in approximately 45 minutes of the afternoon practice. *Id.* 29:22-30:2 (RA23-24); Tice Depo. 127:10-128:18 (RA215-16) (indicating he removed Stringer from practice during period number 4); Birk Depo. 48:13-49:17 (RA69-70); Withrow Depo. 22:7-15 (RA229). Dr. Knowles visited the trailer while Stringer was there and spoke briefly with Barta both before and after the visit. Knowles Depo. 69:19-70:25 (RA137-38); Barta Depo. 50:19-51:20, 55:1-11 (RA35-37). Dr. Knowles gave his approval for Stringer to return to the locker room, Knowles Depo. 70:18-23 (RA138), and told Barta that Stringer was "fine." Barta Depo. 55 (RA37).

That evening, Barta sent intern trainer Daniel (DJ) Kearney to Stringer's dorm room to deliver two bottles of Gatorade, to encourage him to continue to drink fluids. Kearney Depo. 57:15-58:7 (RA119-20); Dixon Depo. 36:20-37:15 (RA96-97).

2. July 31, 2001.

On Tuesday, July 31, Stringer reported for the one scheduled morning practice. Prior to the practice, Chuck Barta checked the weight chart for Monday and Tuesday to determine (pursuant to the team's policy) that Stringer had not lost excessive weight and had regained some amount of weight overnight between practices. The chart showed that Stringer weighed 336 Monday morning, 330 on Monday afternoon, and 332 on Tuesday morning before practice. RA378. This weight loss and re-gain was well within the team's standard policy to allow up to a two-percent weight loss in a 24-hour period. Barta Depo. 224:19-225:11, 259:7-260:1 (RA54-55, 60-61). Barta spoke with Stringer and asked him how he felt. Stringer reported that he still had his usual upset stomach, and Barta gave him some more Tums. Stringer reported no other problems to Barta. Barta Depo. 61:2-64:6, 262:17-24 (RA38-41, 62).

None of the coaches, trainers, or players on the field who were familiar with Stringer (some since the day Stringer arrived at the Vikings in 1995) believed Stinger was experiencing any kind of health emergency when Stringer left the field after the morning practice on Tuesday, July 31. Tice Depo. 229:6-11 (RA226); Dixon Depo. 40-44, 59:7-60:16, 63:23-64:4, 121:3-21 (RA98-107); Birk Depo. 116:6-11 (RA80); Withrow Depo. 82:15-83:2, 108:6-14 (RA238-40); Dalton Depo. 125-130, 142:17-23 (RA86-92). Stringer completed the morning practice without seeking any trainer assistance. The coaches and players who worked the most closely with Stringer agreed that he had a very good practice and saw nothing in his appearance, behavior, or demeanor that they regarded as unusual. Tice Depo. 287:16-22 (RA227); Birk Depo. 84:3-11 (RA76).

At the close of practice, Coach Green gathered the team together to make some comments and released the players to their position coaches. Offensive Line Coach Tice then took his line through a typical set of post-practice drills. Stringer completed the first set of drills and then moved with the team down the field towards a large punching bag known as "Big Bertha" to perform blocking reps. Birk Depo. 75 (RA72); Withrow Depo. 37-40 (RA232-35). At this time, Stringer and the other players all had their pads and helmets off. Withrow Depo. 37:4-6 (RA232). During the walk to Big Bertha, Stringer stopped to rest on a knee and let out a yell. Teammate Cory Withrow asked him if he needed a trainer. Withrow believes Stringer indicated he did not (though Stringer did not respond verbally), and Stringer continued to walk and/or jog toward the bag without assistance. Withrow Depo. 37-40 (RA232-35) (indicating he did not believe Stringer wanted a trainer at that time).

Memories differ slightly regarding the sequence of events once the offensive line got to Big Bertha. All agree that at some point Stringer lay on his back on the field. When Matt Birk and Cory Withrow saw Stringer on the ground, they both called "trainer," to which both trainers Paul Osterman and intern trainer DJ Kearney immediately responded. Kearney Depo. 61:3-15 (RA121); Birk Depo. 80:19-22 (RA73). Birk and Withrow both believed Stringer was tired, but did not think he was experiencing any kind of medical emergency. Birk Depo. 84:3-11 (RA76); Withrow Depo. 82:15-83:2 (RA238-39).

Curiously, the plaintiffs continue to allege that Stringer lay on the ground up to five minutes with no Vikings trainers attending to him. In fact, the undisputed evidence

establishes the very opposite. Plaintiffs' witness Billy Robin McFarland took a photo of Stringer in this position, on which the plaintiffs rely heavily in their argument. A469 (Photo 4-K). McFarland testified that he took the photograph almost immediately upon Stringer lying down. McFarland Depo. 81:23-82:4 (RA140-41). Trainers Osterman and Kearney are in that photo. Osterman Depo. 37:4-38:21 (RA158-59). Stringer got up from that position within seconds of them arriving to attend to him. Osterman Depo. 187:4-11 (RA192). Matt Birk shooed McFarland away from the scene immediately after McFarland took photo 4-K, and McFarland admittedly saw nothing that transpired after that. McFarland Depo. 81:23-83:21, 85-86 (RA140-41, 143-44). The record provides no legitimate support for the contention that Stringer lay unattended for five minutes.

After arriving where Stringer lay, Osterman asked Stringer what was wrong and if he needed help. Stringer simply got to his feet and returned to the drills. Although both Coach Tice and Matt Birk witnessed Stringer slip doing the Big Bertha drill, they both agreed this was not unusual and did not attribute it to any health issue. Tice Depo. 213:8-214:19 (RA219-20); Birk Depo. 82:10-19 (RA75). After the drills concluded, the players headed back to the locker room. Osterman directed Stringer not to walk unattended to the locker room, but instead to cool off in the air-conditioned trailer just steps away. Osterman Depo. 41:2-11 (RA162). At that point, Stringer's fellow players and coaches believed he was only showing physical signs of fatigue and did not believe he needed emergency medical attention.

The precise timeline of this period and the time in the trailer cannot be firmly established, and the record does not support the so-called "time line" plaintiffs suggest in

their Statement of Facts. No witness who was deposed about the events of Tuesday, July 31, 2001, could provide certain times for the events after the Vikings' morning practice, and their estimates sometimes conflicted, as often happens in such circumstances. *See, e.g.,* Osterman Depo. 31:5-32:16 (RA154-55); Zamberletti Depo. 85:23-88:14 (RA257-60); Kearney Depo. 65:17-66:1 (RA122-23).

C. Paul Osterman

Paul Osterman graduated from the athletic training program at the University of Minnesota Mankato with a 4.0 GPA in May 2001 and had recently passed the examination affording him national certification in athletic training. Osterman Depo. 123:10-13 (RA183); Patrick Sexton Affidavit ¶ 6, Exh. B (RA296, 312). Osterman was trained in the symptoms of heat illness and was aware of them at the time he was a seasonal assistant trainer for the Vikings in the summer of 2001. *See* Osterman Depo. 74:14-20, 206-08 (RA173, 195-97). Osterman considered those signs, along with all of the rest of his training, while observing Stringer on July 31, 2001. *Id.*

The undisputed facts establish: Osterman responded immediately to the request for a "trainer" to attend to Korey Stringer. Osterman Depo. 31:4-18 (RA154); Withrow Depo. 79:5-80:15 (RA236-37) (indicating he called for a trainer and they responded all within roughly 30 seconds of Withrow seeing Stringer on the ground); Birk Depo. 81:7-11 (RA74). Osterman saw Korey Stringer lying on the ground and went to him. Osterman Depo. 33:14-34:14 (RA156-57). Student intern DJ Kearney had also responded to the call for a trainer and was already with Stringer. *Id.* 38:12-14 (RA159). Osterman asked Stringer if he was okay. Stringer did not respond, but instead

immediately got up and took his turn on Big Bertha. *Id.* 39:14-19 (RA160). Osterman watched Stringer and then asked Stringer to join him in the on-field first aid station to cool off. Osterman explained that this was done as a precautionary measure, and not because Stringer was exhibiting any concerning signs or symptoms that he was having any kind of trouble. *See id.* 40:14-41:11 (RA161-62).

While in the trailer with Stringer: (1) Osterman provided Stringer with water, *id.* 45:24-46:7 (RA163-64); (2) Osterman made a visual observation of Stringer's physical and mental condition, and asked Stringer how he was feeling, *id.* 41:12-15, 67:8-17 (RA162, 169); (3) Osterman observed nothing unusual and nothing that indicated Stringer was having any kind of health crisis, *id.* 54:20-55:13, 103:17-20, 186-87, 193-94 (RA166-67, 181, 191-94) (noting that Stringer was never talkative with the athletic trainers); (4) Osterman felt Stringer's skin and noted that it was cool and moist, not hot and dry as he had been taught was the classic sign of heat stroke, *id.* 55:9-13 (RA167); (5) Osterman called to bring a cart to drive Stringer back to the Taylor Center rather than make him walk the distance when Osterman was ready to bring Stringer inside, *id.* 62:11-17 (RA168); (6) at the first sign that Stringer was having a health crisis, Osterman performed the ABCs of first aid, checking Stringer's pulse and breathing, and told Kearney to get Fred Zamberletti, *id.* 72:2-73:16 (RA171-72); (7) Osterman applied ice towels to Stringer, *id.* 68 (RA170); Kearney Depo. 83:8-12, 101 (RA130, 132) (ice towels were on Stringer when Kearney arrived at the trailer with Zamberletti); and (10) Osterman turned Stringer on his side to aid his breathing. Osterman Depo. 298 (RA198); Kearney Depo. 69-72 (RA124-27). Although Stringer moved off the relatively small

training table and moved his head to his own humming, the record provides no basis for plaintiff's cryptic characterization of these actions as "unexplained movements." Pl. Br. at 12-14. Stringer acted in the same manner as he had on the day prior, when Osterman also observed him in the trailer. *Id.* 54:20-55:13, 103:17-20, 186-87, 193-94 (RA166-67, 181, 191-94).

Paul Osterman observed Stringer for signs of heat exhaustion the entire time they were in the trailer on July 31, Osterman Depo. 74:14-20, 206-08 (RA173, 195-97), but Stringer simply did not present any symptoms of heat stroke until he became semi-conscious while lying in the trailer and cooling off. Osterman Depo. 88:15-89:2 (RA178-79). At the first sign of significant trouble, Osterman sent for Zamberletti, *id.* 72:14-17 (RA171), checked Stringer's vital signs, *id.* 72:18-24 (RA171), turned Stringer on his side to assist his breathing, *id.* 298 (RA198), and continued to monitor his vitals and apply ice towels while waiting for Zamberletti to arrive, *id.* 77:22-78:4 (RA174-75). When Zamberletti arrived, Osterman called Dr. Knowles and also directly contacted the ambulance service. *Id.* 82:9-15, 84:13-21 (RA176-77). At that point, Osterman turned Stringer's care over to Fred Zamberletti, and Osterman waited outside to more quickly direct the ambulance to the trailer when it arrived. *Id.* 91 (RA180).

D. Fred Zamberletti

Fred Zamberletti is an award-winning athletic trainer with over forty years of experience in the NFL and with the Minnesota Vikings. *See* RA383-89 (Zamberletti Curriculum Vitae). He had been Head Athletic Trainer for the team from its inception in 1961 until 1998, when Chuck Barta took over that position. *Id.* In 2001, his title was

Coordinator of Medical Services for the Minnesota Vikings. Zamberletti Depo. 7:3-10 (RA242). Zamberletti was in the first aid trailer on Monday, July 30, when Chuck Barta brought Stringer in to cool down. Zamberletti Depo. 211:22-24 (RA270). Zamberletti had no interaction with Stringer that day other than to briefly commiserate with him, as Stringer was frustrated that he had had to leave practice. *Id.* 109:1-112:3 (RA261-64). Osterman was in the trailer at that time as well, but had no interaction with Stringer other than to drive Stringer and another player to the training room when Dr. Knowles instructed they could go. Osterman Depo. 176:4-181:4 (RA184-89). Dr. Knowles made a note on his contact sheet with Stringer in the trailer, documenting that a medical doctor actually reviewed Stringer's condition and made no comment that Stringer should not practice the next day. A537.

On July 31, Zamberletti's first notice that Korey Stringer was suffering any problem came when intern trainer Kearney came to Zamberletti in the training room across the street from the field after morning practice and asked him to assist Osterman in the on-field trailer. Zamberletti Depo. 53 (RA251). At that time, Stringer had just started breathing heavily and rapidly, and Zamberletti recognized as soon as he walked into the trailer that he was dealing with a medical emergency. *Id.* 38:7-13 ("Q: When you went in the trailer, you thought that you and Mr. Osterman and Mr. Kearney were all working together to assist each other? A: Yes. Q: And what was your role? A: Well, my role was -- when I saw him, was to get him to emergency care."), 50-52 (RA243, 248-50).

Kearney, who arrived with Zamberletti at the trailer, agreed that Zamberletti immediately recognized the situation as an emergency. Kearney Depo. 108:19-23 (RA133).

Zamberletti assessed Stringer's symptoms, saw that Stringer was hyperventilating, attempted to treat the hyperventilation by having Kearney hold a bag over Stringer's mouth, and ordered Osterman to call Dr. Knowles and to arrange for Stringer to be taken to the hospital. Zamberletti Depo. 43-44, 50:5-52:5 (RA244-45, 248-50); Osterman Depo. 82:9-15, 84:13-21 (RA176-77). Zamberletti's application of this common treatment for hyperventilation lasted only an estimated 40 to 90 seconds. Zamberletti Depo. 43-44 (RA244-45); Kearney Depo. 74:20-75:18(RA128-29).

Contrary to the plaintiffs' version of these events, the undisputed facts demonstrate that Zamberletti fully considered all the possible complications Stringer might be experiencing, and did not rule anything conclusively in or out. Zamberletti considered heat stroke as a possibility, but also considered fainting, a seizure, an insect bite, a reaction to medication, and shock. Zamberletti Depo. 200-03 (RA265-68).

Once an ambulance had been summoned, Zamberletti continued to monitor the unconscious Stringer's airway, breathing, and circulation, with the assistance of Kearney. Zamberletti Depo. 67:25-68:3 (RA254-55); Kearney Depo. 99:14-23 (RA131). Once the ambulance arrived, Zamberletti rode along to the hospital to assist the emergency medical technicians at their request, and one of the technicians told him afterwards that he did an "outstanding job" of assisting with Stringer's breathing apparatus. Zamberletti Depo. 235:5-14 (RA272); Near Depo. 53 (RA150).

ARGUMENT

This case presents a straightforward application of the bar contained in Minnesota's Workers' Compensation Act to claims against co-employees, albeit in the

unusually tragic and public circumstance of the death of Viking Korey Stringer.

Longstanding workers' compensation case law forbids a civil claim by one employee against a co-employee unless the employee can establish two elements: (1) that the injury resulted from the gross negligence of or was intentionally inflicted by the co-employee, and (2) that the co-employee owed a personal (as opposed to employment) duty to the plaintiff. *Wicken v. Morris*, 527 N.W.2d 95, 98 (Minn. 1995).

Plaintiffs cannot as a matter of law establish either of these elements. First, the undisputed facts establish that Zamberletti and Osterman provided significant care, and did not act with gross negligence. In addition, defendants Zamberletti and Osterman owed no personal duty to Stringer, but only duties arising directly out of their employment by the Vikings as trainers. This Court should therefore affirm the lower court decisions dismissing plaintiff Kelci Stringer's gross negligence claims against Zamberletti and Osterman.⁶

⁶ Plaintiffs' brief to this Court addresses *only* the district court's dismissal of Count One of the Amended Complaint (Gross Negligence) (A53-56), and only as to plaintiff Kelci Stringer and defendants Zamberletti and Osterman. *See* Pl. Br. at 2, n.1. Plaintiffs do not argue that the district court erred in dismissing any of the other Viking defendants, or in dismissing Counts Nine and Ten against defendants Zamberletti and Osterman. Likewise, plaintiffs' brief does not dispute the Court of Appeals' holdings that defendant Chuck Barta owed no personal duty to Corey Stringer and did not act with gross negligence toward Stringer. *See* 686 N.W.2d at 551, 552-53. Plaintiffs also do not argue here that the district court erred in dismissing the claims of plaintiffs Kodie, James, and Cathy Stringer on the ground that Minnesota's wrongful death statute (Minn. Stat. §§ 573.02) authorizes only personal representative Kelci Stringer to assert a wrongful death claim. June 5, 2002, Order at 12 (RA12). Finally, although plaintiffs' brief bears the case numbers of both of the consolidated appeals addressed in the Court of Appeals

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I. STANDARD OF REVIEW.

This Court reviews a grant of summary judgment *de novo*, resolving all conflicts in the evidence in favor of the non-moving party. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

With respect to the Workers' Compensation statute, the Court is not to construe the statute liberally in favor of the worker, but is to apply an even-handed, nondiscriminatory standard. "[T]he even-handed standard is the correct standard to apply in determining questions of law under the Act." *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 894 (Minn. 1996); *see also* Minn. Stat. § 176.001 ("It is the specific intent of the legislature that workers' compensation cases shall be decided on their merits and that the common law rule of 'liberal construction' based on the supposed 'remedial' basis of workers' compensation legislation shall not apply in such cases.").

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decision, plaintiffs' brief does not here argue the award of costs that was the subject of appeal no. A04-205.

Because plaintiffs have not pursued these issues, defendants are entitled to affirmance of the district court's judgment dismissing them. *See In re Olson*, 648 N.W.2d 226 (Minn. 2002) (issues not argued in appellate brief are deemed waived on appeal); *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982). Personal representative Kelci Stringer's gross negligence claim in Count One is the only portion of this case presently before the Court. For consistency with appellants' brief, however, this brief will nevertheless continue to use the plural "plaintiffs."

II. THE UNDISPUTED EVIDENCE PRECLUDES ANY FINDING OF GROSS NEGLIGENCE BY ZAMBERLETTI OR OSTERMAN.

This Court should affirm the holdings of the district court and the Court of Appeals, both of which concluded as a matter of law that plaintiffs cannot establish gross negligence on the part of Zamberletti or Osterman. The Court of Appeals cited and applied the correct standard, and plaintiffs' reliance on an inadvertent omission from a quotation does not change that.

The undisputed facts here demonstrate as a matter of law that Viking trainers Zamberletti and Osterman attended to Stringer's situation as it developed, provided care directed at the symptoms as they appeared, and, when the emergency situation arose, called for medical help. Given Stringer's importance to the team, his friendship with Zamberletti and many others in the Vikings organization, the interests of the trainers, and the trainers' own job-related training and duties, nothing suggests that the trainers would not have responded earlier had significant symptoms appeared. Tragically, they did not, and efforts at treatment were ultimately unsuccessful. Experts can, of course, speculate in hindsight about what more might have been done. Stringer's death does not, however, alter the character of Zamberletti's and Osterman's efforts to save their friend and teammate. Those efforts preclude as a matter of law any finding of gross negligence.

A. The District Court and the Court of Appeals Applied the Correct Standard for Gross Negligence.

Minnesota's standard for gross negligence in the context of its workers' compensation system is a clear and well-established part of the system's careful balance of worker and employer rights. Minnesota's Workers' Compensation system establishes

a tradeoff between the rights of employees and employers, a departure from the common law reflecting a legislative public policy choice. Stated in broadest terms, the system eliminates employers' civil liability to employees under most circumstances while providing a non-fault-based system of compensation to employees for work-related injuries. *See Wicken v. Morris*, 527 N.W.2d 95, 99 (Minn. 1995) ("The scheme of workers' compensation is one of reciprocal concessions by the employer and employee."). Virtually every workplace injury can be traced somehow to the act of a co-employee, however, and a system that would bar claims against employers but permit claims against co-employees would simply shift the risk of workplace injury to those co-employees. As this Court has noted, that is not the intent of Minnesota's system. *See Wicken*, 527 N.W.2d at 99 (noting that permitting co-employee liability for carrying out work responsibilities "would eviscerate the fundamental purpose of the workers' compensation laws.").

To prevent this outcome, Minnesota law bars liability by one employee to another except under the most extreme circumstances. This bar appears in Minn. Stat. § 176.061, subd. 5(c), which provides in relevant part:

A coemployee working for the same employer is not liable for a personal injury incurred to another employee unless the injury resulted from the gross negligence of the coemployee or was intentionally inflicted by the coemployee.

As courts have noted over the decades, "gross negligence" is not readily susceptible to a single, compact definition. Most authorities, including this Court, have regularly defined gross negligence in terms that include alternative descriptions of the single standard.

This Court engaged in a detailed examination of the standard in *State v. Bolsinger*, 21 N.W.2d 480 (Minn. 1946), where it observed:

Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others.

Id. at 485; *see also State v. Meany*, 262 Minn. 491, 115 N.W.2d 247, 252 (1962) (“very great negligence or without even scant care”); *State v. Chambers*, 589 N.W.2d 466, 478 (Minn. 1999) (“without even scant care”). Echoing these authorities, the Minnesota Practice Series proposes a jury instruction that employs alternative descriptions of the gross negligence concept:

Gross negligence occurs when a person does not pay the slightest attention to the consequences, or uses no care at all.

Minnesota CIVJIG 25.35 (4th ed. 1999) (citing *Chambers*). Contrary to plaintiffs’ suggestions, there has been no upheaval or controversy over whether one case or another has changed Minnesota’s standard for gross negligence. This has been a remarkably stable area of the law.

Minnesota’s practice of using alternative but consistent phrasings to describe the concept of gross negligence is entirely consistent with the practice nationwide. For example, the leading treatise on tort law defines gross negligence in several different

ways, as “very great negligence, or the want of even slight or scant care. It has been described as a failure to exercise even that care that a careless person would use.”

W. Keeton, Prosser & Keeton on the Law of Torts § 34, at 211-12 (5th ed. 1984). Black’s Law Dictionary defines gross negligence as a “lack of slight diligence or care.” Black’s Law Dictionary at 1057 (7th ed. 1990). *See also generally* 18B Words and Phrases at 331-413 (2003 and 2004 Supp.) (collecting definitions and cases).

In keeping with these authorities, the Court of Appeals here noted the several different ways of describing the gross negligence standard, quoting no fewer than nine of the descriptions of the standard set out in *Bolsinger*. *See* 686 N.W.2d at 552. The court also noted that the most recent word on the subject from this Court was in *State v. Chambers*, where the Court defined gross negligence as ““without even scant care but not with such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong.”” 686 N.W.2d at 552 (quoting *Chambers*, 589 N.W.2d 466, 478-79).

The court then examined the evidence under the gross negligence standard and, as discussed in the following section, correctly concluded that the evidence plaintiffs offered could not as a matter of law meet this standard. At one point in its discussion, however, the Court of Appeals decision restated only a portion of the *Chambers* quotation of the gross negligence standard, rather than repeating the entire quotation again. *See* 686 N.W.2d at 552 (“there is no basis to conclude respondents disregarded the risk to Stringer altogether in a manner ‘equivalent to willful and intentional wrong’,” quoting *Chambers*). The proper quotation would have said, “there is no basis to conclude respondents disregarded the risk to Stringer altogether in a manner ‘without even scant care but not

with such reckless disregard of probable consequences as is equivalent to willful and intentional wrong.””

Plaintiffs have latched onto this minor and isolated inconsistency in wording to argue that the Court of Appeals applied the wrong standard. See Pl. Br. at 28-30. This argument reflects a fundamentally unfair and overly narrow reading of the Court of Appeals decision. Whether the shortened quotation was a conscious abbreviation or merely an oversight, it cannot be read out of the context of the decision as a whole. The Court of Appeals decision repeatedly cited and quoted this Court’s various phrasings of the gross negligence standard throughout its decision, and correctly applied that standard to the facts before it:

Even when viewed in the light most favorable to appellants, the uncontroverted record establishes that respondents were cognizant of potential adverse consequences arising from Stringer's condition and took some actions to care for him. ... Because the evidence, viewed most favorably to appellants, cannot support a conclusion of gross negligence as a matter of law, the district court properly granted summary judgment.

686 N.W.2d at 552. The fact that the Court of Appeals’ requotation of the gross negligence standard in the midst of this paragraph was incomplete in no way undermines either the correctness of the standard the court actually considered and applied or the correctness of its result.

Plaintiffs’ argument in effect urges the Court to freeze the concept of gross negligence into a single, inflexible definition and to jettison the useful array of descriptive phrases that this and other courts have long employed. Plaintiffs apparently

view these definitions as separate and distinct standards for gross negligence, rather than simply as alternative formulations of the same underlying standard. As a result, plaintiffs essentially argue that their proposed definition is correct and all the others the court have used over the years are wrong.

Plaintiffs' fundamental premise is incorrect. As *Bolsinger*, *Chambers*, and *Meany* all make clear, courts have suggested different phrasings of the standard for different contexts, but all these phrasings state the same basic rule. Some descriptions of gross negligence may be more helpful than others in a given context, depending on the character of the duty, the duration of the conduct, whether the conduct involved an act or an omission, or any of a number of other factors. There is, however, only one standard, and both the district court and the Court of Appeals here applied that standard.

Contrary to plaintiff's argument, this traditional standard for gross negligence is not "unsound." See Pl. Br. at 33-36. First, regardless of whether "slight care" is difficult to define (as plaintiffs argue on page 33), the *absence* of slight care is not. On the contrary, "the absence of even slight care" offers one of the more easily and intuitively understood definitions among the many this Court has listed. Second, plaintiffs' suggestion that the history of "gross neglect" in bailment cases supports a lower standard here, Pl. Br. at 34, is in error. If anything, the historical standard for gross negligence appears to have been higher, and was linked to an intentional tort. The eighteenth century case that plaintiffs cite notes: "So that a bailee is not chargeable without evidence of gross neglect, and if there is such a gross neglect, *it is looked upon as*

evidence of a fraud.” *Coggs v. Bernard*, 92 Eng. Rep. 107, *6 (1703) (Holt, J.). No Minnesota case has ever so equated gross negligence with fraud.

Plaintiffs’ attempt to create a great disparity in the standard between the decisions here and in other cases ignores the differing contexts of those other cases. For example, in the vehicular homicide cases plaintiffs cite, the defendants were of course driving, and the nature and scope of their conduct and the care they could take was thus severely circumscribed. Under such circumstances, complete inattention to the road is very nearly the only conduct that could logically constitute an “absence of even slight care.” See *State v. Al-Naseer*, 678 N.W.2d 679 (Minn. App. 2004); *State v. Pelawa*, 590 N.W.2d 142, 145 (Minn. App. 1999); *State v. Hegstrom*, 543 N.W.2d 698, 703 (Minn. App. 1996); *State v. Boldra*, 292 Minn. 491, 492, 195 N.W.2d 578, 579 (1972). In contrast here, plaintiffs rely on a much more complex series of events covering a substantial period of time, and any evaluation of the care defendants took must likewise take that into account. Minnesota’s appellate cases applying the gross negligence standard—including the Court of Appeals decision here—apply the standard consistently in their respective contexts.

Plaintiffs also assume (without ever actually stating) that Zamberletti’s and Osterman’s status as “licensed health care providers” [sic]⁷ somehow lowers the standard

⁷ Actually, athletic trainers are not licensed, but only registered, with the state of Minnesota pursuant to Minn. Stat. § 148.7803. Athletic trainers in Minnesota require no license. Since 1993, however, Minnesota has required that persons who use terms like “athletic trainer” in connection with their names must register with the Minnesota Board

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plaintiffs must meet to establish their gross negligence claim. *See* Pl. Br. at 34, 36. Plaintiffs cite no authority for such a double standard, and defendants are aware of no support for the proposition. Although the trainers' backgrounds and experience are factors to weigh in evaluating their conduct—and indeed make the allegations of gross negligence less than credible—these factors do not change the standard the Court must apply.

Finally, even assuming *arguendo* plaintiffs were correct and their preferred “negligence of the highest degree” were the only permissible definition of gross negligence, *see* Pl. Br. at 34, 41, 56 (urging this standard), the district court here in fact applied that standard. The district court specifically cited the “negligence in the highest degree” standard in its Order and held that the plaintiffs had failed to create a genuine issue of material fact that would permit a jury to find gross negligence under that standard. April 25, 2003, Order at 65 (A136). The Court of Appeals used similar language in its affirmance. *Stringer*, 686 N.W.2d at 552 (“Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. ... It is very

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of Medical Practice. Minn. Stat. § 148.7803, subd. 1. Exactly what this statute means by “use in connection with the person’s name” has not yet been judicially construed. Zamberletti was registered at the time of these events. Osterman, apparently due to delays in getting his college transcript and the press of his duties for the team, failed to get his registration until much later in the season. Osterman Depo. 20:19-21:21 (RA152-53). When he sought the registration, he received it without any problem and without the need to fulfill any additional substantive requirements. Plaintiffs’ brief does not claim that this paperwork delay is related to Korey Stringer’s death, nor could it be given Osterman’s appropriate and successful training and the fact that all substantive requirements for registration were complete. *See* Sexton Affidavit ¶ 8 (RA297).

great negligence...”). The lower courts here applied the correct standard, and plaintiffs’ suggestions to the contrary cannot be sustained.

B. The Undisputed Evidence Establishes as a Matter of Law that Defendants Did Not Act with Gross Negligence.

As they did in the courts below, plaintiffs try to impress this Court with volume. Plaintiffs’ brief is full of lists and enumerations, both from their experts (e.g., Pl. Br. at 18-19) and from their attorneys (Pl. Br. at 37-42). Plaintiffs apparently believe that, if they assemble enough examples of possible ordinary negligence, they will achieve gross negligence. Many of their examples are claimed omissions, and it is of course easy to marshal a long list of acts a party did *not* do. Plaintiffs cite no authority, however, that a plaintiff can establish gross negligence by counting acts or omissions alleged to be ordinary negligence. On the contrary, all of the various denominations of “gross negligence” focus on the quality, not the quantity, of the defendant’s conduct, and all of the cases cited by both parties focus on the character of the defendant’s acts, not their number. Nor can plaintiffs cure this problem by having their experts characterize the trainers’ conduct as gross negligence. *See* Pl. Br. at 24, 40, 42. Minnesota courts require more than such a mere conclusion to sustain a gross negligence claim. *See Potter v. Pohlad*, 560 N.W.2d 389, 395 (Minn. App. 1997) (holding that “conclusory statements” of expert “does not create a fact issue precluding summary judgment” on plaintiff’s gross negligence claim).

Plaintiffs have essentially collected a large number of individual events and tried to put them together into a package that they conclusorily call gross negligence, while

disregarding all the undisputed evidence that does not fit their desired result. Inasmuch as plaintiffs claim that Zamberletti's and Osterman's entire course of conduct constitutes the gross negligence, the Court must look at that entire course, not just the snatches that plaintiffs have chosen to offer. When the full picture is reviewed, plaintiffs' evidence simply does not sustain a finding of gross negligence.

1. No evidence supports a conclusion that Fred Zamberletti was grossly negligent.

The lower courts correctly held as a matter of law that Fred Zamberletti was not grossly negligent. Zamberletti had no substantial contact with Korey Stringer until finding him unresponsive in the on-field first aid station on Tuesday, July 31.⁸ Even then, the first and only contact Zamberletti had with Stringer was when Zamberletti was brought to the on-field first aid station by student intern Dan Kearney. *See Zamberletti Depo. 211:25-212:2 (RA270-71)*. Immediately on walking into the trailer, Zamberletti assessed Stringer's "ABCs" (airway, breathing, circulation). *See id. 44:4-8; 50:5-7 (RA245, 248)*. He identified that Stringer was hyperventilating and attempted to treat that problem. *Id. 49:6-20 (RA247)*. At that point, Zamberletti did not know what was wrong with Stringer. Indeed, his training and experience⁹ taught him that Stringer's

⁸ Zamberletti's only contact with Stringer on Monday occurred when he happened to be in the trailer with another player when Chuck Barta brought Stringer into the trailer after removing him from afternoon practice. *See Zamberletti Depo. 211:22-24 (RA270)*. He had a brief conversation with Stringer, but no other contact. *Id. 109:6-24 (RA261)*.

⁹ Zamberletti is a nationally known, highly respected trainer who had been with the Vikings for more than 40 years. *See RA383*.

unconsciousness could be caused by any of a number of conditions, of which heat illness was only one. *Id.* 68:20-69:21 (RA255-56). According to Zamberletti's assessment, Stringer was still sweating and his skin did not feel hot; contrary findings (no sweating, hot skin) are more traditionally associated with heat stroke. *Id.* 48:9-23 (RA246). Zamberletti had Kearney place a bag over Stringer's nose and mouth for what he estimates was 45 to 60 seconds, to manage the hyperventilation. *Id.* 50:5-15 (RA248). Zamberletti did not then know that Stringer was suffering heat stroke, and what he did is a classic response to manage hyperventilation, a condition that can make a patient (especially such a large and strong patient) difficult to control and help. Zamberletti plainly intended the use of the bag to help Korey Stringer, however plaintiffs now choose to characterize that care.

Zamberletti's first goal was to get Stringer to a doctor. Zamberletti Depo. 38:12-13; 51:15-52:5 (RA243, 249-50). After attempting to remedy Stringer's immediate problem of hyperventilation, Zamberletti instructed Osterman to contact Dr. Knowles, and to arrange to get Stringer to the hospital. *Id.* 65-67 (RA252-54). While Zamberletti was unable to estimate time, his initial assessment of Stringer and his decision that Stringer needed immediate medical attention clearly occurred very shortly after his arrival at the trailer. *See id.* 51-52 (RA249-50). After the ambulance had been called, Zamberletti continued to visually monitor Stringer's airway, breathing, and circulation. *Id.* 67:25-68:3 (RA254-55). He then helped the ambulance crew bag Stringer and rode in the ambulance to the hospital. The ambulance personnel agreed that Zamberletti was

competent and capable in the care he provided Stringer in the ambulance. Near Depo. 53 (RA150).

The uncontroverted evidence in this case thus establishes that Fred Zamberletti was in Korey Stringer's presence for mere minutes on July 31, 2001. In those few minutes he instructed Paul Osterman to call Dr. Knowles and an ambulance. Zamberletti Depo. 65-67 (RA252-54). His use of the paper bag was intended to help Stringer by getting Stringer's hyperventilation under control. Like plaintiffs' whole case, their allegations against 40-year Vikings trainer Fred Zamberletti are based on 20/20 hindsight. Plaintiffs' experts opine on Zamberletti's actions in his few minutes of involvement with the knowledge that Korey Stringer died of heat stroke, rather than based on the situation presented to Zamberletti at the time. That is not the legal standard for gross negligence. Zamberletti did not act with "very great negligence, or the absence of slight diligence, or the want of even scant care," *Bolsinger*, 21 N.W.2d at 485, and this claim was properly dismissed.

2. No evidence supports a conclusion that Paul Osterman was grossly negligent.

The lower courts likewise correctly held as a matter of law that Paul Osterman was not grossly negligent. The undisputed facts establish that Osterman assessed Korey Stringer's condition on Tuesday, July 31; that he provided care to Stringer based on the signs and symptoms Stringer exhibited; and that he sought assistance as soon as the severity of the situation revealed itself. By necessity, Osterman is the sole historian of the facts regarding what transpired in the training staff trailer between Osterman and

Korey Stringer on July 31, 2001. Osterman's recitation of these facts has never wavered. From the statement he prepared within days of the incident, *see* RA379-80, to the deposition testimony he provided nearly a year later, Osterman has been clear and consistent about the events that transpired after the end of morning practice on July 31.

First, Chuck Barta informed Osterman that he would be the trainer to stay on the field until all players left. Barta Depo. 332:16-25 (RA63). This was the normal practice of the Minnesota Vikings training staff—that a trainer would be on the field at all times that a player was on the field. *Id.* 77:3-7 (RA42). As Barta left the field that morning, he provided Osterman with a cellular phone and a list of emergency contact numbers. Osterman Depo. 53:2-21 (RA165); Barta Depo. 332:23-25 (RA63); *see* RA381 (list of emergency contact numbers kept with the cell phone). This list included, among others, a direct number for Gold Cross Ambulance, numbers for Dr. Knowles, his clinic, and his nurses' station, and the number for the athletic training room at the Taylor Center across the street from the practice fields. Thus, Osterman had every emergency number he needed immediately available to him.

After Barta left, Osterman stayed on the field. At some point, he heard a player yell "trainer," and he responded immediately. Osterman Depo. 31:4-18 (RA154). He saw Korey Stringer on the ground and went over to him. *Id.* 33:14-34:14 (RA156-57). Student intern Dan Kearney also responded to the call for a trainer and was already with Stringer. *Id.* 38:12-14 (RA159). Osterman asked Stringer if he was okay. Stringer did not respond, but instead immediately got up and took his turn on Big Bertha. *Id.* 39:14-19 (RA160). Osterman watched Stringer and then asked Stringer to join him in the on-

field first aid station to cool off. Osterman explained that this was done as a precautionary measure, and not because Stringer was exhibiting any concerning signs or symptoms that he was having any kind of trouble. *See id.* 40:14-41:11 (RA161-62).

Osterman's care continued into the first aid trailer. While in the trailer with Stringer, Osterman provided Stringer with water. *Id.* 45:24-46:7 (RA163-64). He made a visual observation of Stringer's physical and mental condition, and asked Stringer how he was feeling. *Id.* 41:12-15, 67:8-17 (RA162, 169). Osterman observed nothing unusual or that indicated Stringer was having any kind of health crisis. *Id.* 54:20-55:8 (RA166-67). Osterman felt Stringer's skin and noted that it was cool and moist. *Id.* 55:9-13 (RA167). After some amount of time, he called to bring a cart to drive Stringer back to the Taylor Center rather than make him walk the distance. *Id.* 62:11-17 (RA168). At the first sign that Stringer was having a health crisis, Osterman performed the ABCs of first aid, checking Stringer's pulse and breathing, and asked Dan Kearney to get Fred Zamberletti. *Id.* 72:2-73:16 (RA171-72). Osterman also began applying ice towels to Stringer. *Id.* 68 (RA170). According to the medical literature, heat stroke is often precipitous in onset and does not give warning in the form of prodromal symptoms. *See* E. Randy Eichner, MD, Affidavit ¶ 6 (RA276-77).

Osterman's account of events in the trailer is supported circumstantially by the medical literature with respect to the precipitous onset of heat stroke, and by the testimony of Mike Tice, Matt Birk, Cory Withrow and David Dixon, all of whom testified that they saw Korey Stringer immediately before he went into the first aid trailer and did not believe he was in any kind of health crisis. *See* Tice Depo. 223-227 (RA221-

25); Birk Depo. 116:6-11 (RA80); Withrow Depo. 108:6-14 (RA240); Dixon Depo. 121:11-21 (RA107).

The great weakness in plaintiffs' claims against Osterman is that they assume that Stringer exhibited certain symptoms sometimes exhibited by heat stroke victims to which Osterman should have reacted. However, the facts demonstrate the opposite—that Korey Stringer exhibited amazingly few signs of heat stroke that day. His skin was cool and moist at the end of practice; he had a great practice that morning; he declined a trainer's assistance despite being asked twice (yet a trainer still followed up); he never complained of anything other than an upset stomach; up to moments before he became unconscious he was mentally coherent, asking Osterman to remove his shoes and thanking him. Plaintiffs' litany of alleged signs that Osterman missed that day are nothing more than a lawyer's list of "wouldas and shouldas" that ignore the situation actually presented to Osterman and what he did in response.

All plaintiffs have done is hypothesize in hindsight as to what Osterman should have recognized and assume that Korey Stringer was exhibiting some signs of heat stroke. Even assuming for the sake of argument that evidence of such symptoms existed, Osterman undeniably responded to the call, took Stringer into an air-conditioned trailer, observed him, gave him water, and called for help when Stringer became unresponsive. He clearly provided care. Like Zamberletti, Osterman did not act with "very great negligence, or the absence of slight diligence, or the want of even scant care," *Bolsinger*, 21 N.W.2d at 485, and the district court properly dismissed the claim against him.

In sum, as both lower courts concluded, the undisputed facts here establish as a matter of law that Zamberletti's and Osterman's conduct toward Korey Stringer did not constitute gross negligence. There may someday be a case in which the Court is called on to decide whether the care a defendant gives can be so inappropriate or wrongheaded as to constitute gross negligence. *See* Pl. Br. at 33-35. The present case is not, by any stretch of the imagination, that case. Comparing the care that Zamberletti and Osterman gave to valued teammate and friend Korey Stringer to "applying leeches to remove 'bad blood'", Pl. Br. at 33, is an insult to these men and a disservice to the Court. The Court should affirm.

III. ANY DUTIES THAT ZAMBERLETTI AND OSTERMAN OWED TO KOREY STRINGER WERE EMPLOYMENT DUTIES, NOT PERSONAL DUTIES.

Even assuming for the sake of argument that a jury could somehow conclude that Zamberletti's and Osterman's efforts to care for Stringer constituted gross negligence, the Court should nonetheless affirm the summary judgment on the ground that neither Zamberletti nor Osterman owed a personal (as contrasted with a professional) duty to Stringer.¹⁰ The existence of a duty is a question of law that this Court reviews *de novo*. *E.g., Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985).

¹⁰ Out of an abundance of caution, defendants sought and the Court granted cross review on the personal duty issue. *See* Defendants' Response to Petition for Review at 5 (Nov. 10, 2004); Nov. 23, 2004 Order at 2. In reality, however, the lack of a personal duty by defendants to Stringer is not a ground for altering the judgment (as would be the case in a notice of review), but an alternative ground for affirming the existing summary judgment.

A. To be Liable to a Co-employee, a Defendant Must Owe the Employee a Personal Duty that Goes Beyond the Employer's Duty to Provide a Safe Workplace.

The requirement of a personal duty underlying a claim against a co-employee predates the statutory gross negligence requirement. This Court first adopted the “personal duty” requirement for claims against co-employees in *Dawley v. Thisius*, 304 Minn. 453, 231 N.W.2d 555 (Minn. 1975). The Court stated:

Personal liability...will not be imposed on a co-employee because of his general administrative responsibility for some function of his employment without more. He must have a personal duty towards the injured plaintiff, breach of which has caused plaintiff's damage.

304 Minn. at 456, 231 N.W.2d at 557.

In 1979, the legislature amended the Workers' Compensation statute to include the gross negligence requirement discussed above. See 1979 Minn. Laws Ex. Sess. ch. 3, § 31, subd. 5. This Court's decision in *Wicken v. Morris*, 527 N.W.2d 95 (Minn. 1995), however, made clear the personal duty requirement remained in place, and that the addition of the element of gross negligence had created a “two prong test.” 527 N.W.2d at 98. The *Wicken* court described the personal-duty requirement as follows:

[T]he injured employee must establish that the co-employee had a personal duty toward the employee, the breach of which resulted in the employee's injury, and that the activity causing the injury was not part of the co-employee's general administrative responsibilities.

Id. (citing *Dawley*).

This threshold personal-duty requirement provides a critical component of the delicate balance maintained by the Workers' Compensation system. Under that system,

“[t]he duty to provide employees with a safe workplace is a non-delegable duty held by the employer.” *Wicken*, 527 N.W.2d at 99. The protection of co-employees against claims arising out of that same duty is a necessary corollary of that principle. As this Court observed in *Wicken*:

This is a fundamental premise upon which the workers’ compensation laws are based. The seemingly harsh result of holding a co-employee immune from liability arising from breach of the employer’s duty to provide a safe workplace is a necessary part of the statutory scheme, as it maintains the integrity of the compromise between employers and employees implemented by the legislature pursuant to Minn. Stat. § 176.061, subd. 5(c).

Wicken, 527 N.W.2d at 99.

The *Wicken* court also described the character of the “personal duty” that might support a claim against a co-employee:

The personal duty to co-employees contemplated in *Dawley* is no different than the duty any individual owes another arising from normal daily social contact—the duty to refrain from conduct that might be reasonably be foreseen to cause injury to another. *See, e.g., Johnson v. Ramsey County*, 424 N.W.2d 800 (Minn. App. 1988) (personal duty not to batter employees), petition for review denied (Minn, August 24, 1988); *Parker v. Tharp*, 409 N.W.2d 915 (Minn. App. 1987) (personal duty not to assault co-employees).

Wicken, 527 N.W.2d at 98. The *Wicken* court then held that the defendant before it owed no personal duty to the plaintiff because the conduct at issue was “an administrative activity required as an integral part of [defendant’s] employment obligations. *Id.* The Court of Appeals recently relied on *Wicken* in restating this prerequisite:

It is not enough that the injured party alleges simply that the co-employee’s conduct amounts to gross negligence. The

individual must first identify and allege that the co-employee owed and breached a personal duty, as opposed to a duty arising by way of the co-employee's work responsibilities, in order to state a legally cognizable claim against that co-employee. [*Wicken*, 527 N.W.2d] at 98-99. When the allegations surround claims that the co-employee failed to meet responsibilities arising solely out of that co-employee's employment status, those allegations are subsumed by the exclusivity provision of the workers' compensation statute. *Id.*

Wicklender v. Rarick, 2003 WL 282384 (Minn. App. Feb. 5, 2003) (unpublished) (RA390-92).

B. Plaintiffs' Argument that a Co-employee May be Held Liable if the Co-employee Merely has "Direct Contact" with the Plaintiff Finds No Support in Case Law, Logic or Policy.

Throughout this litigation, plaintiffs have urged the courts to adopt an extreme and narrow view of "personal duty," a duty that would protect only those employees in the upper echelons and back offices of companies while leaving exposed the workers "on the line." Purportedly relying on the statement in *Dawley's* holding that a co-employee may not be held liable "because of his general administrative responsibility for some function of his employment without more," 304 Minn. at 456, 231 N.W.2d at 557, plaintiffs argue that the bar protects only those remote employees who, acting at a distance, make company policy that results in a plaintiff's injury. In contrast, plaintiffs argue, those who have direct contact with and injure the plaintiff in actually *carrying out* that policy enjoy no protection under the statute. *See, e.g.*, Pl. App. Br. to Court of Appeals at 33-42. This argument fails for several reasons.

First, it disserves and misinterprets the language this Court used in *Dawley*. The phrase "administrative responsibilities" means just what it says. In connection with an

employer's nondelegable duty to provide a safe workplace, an "administrative responsibility" means the "responsibility" to "administer" the execution of that duty. This is simply common sense. The dictionary defines "administer" as "to manage or supervise the execution, use, or conduct of." Webster's Ninth New Collegiate Dictionary at 57 (1985). Thus, just as an agency that carries out government policy is an administrative agency, an employee who carries out an employer's policy has "administrative responsibilities."

Administering the employer's duty to maintain a safe workplace necessarily involves both formulating safety policy *and* carrying it out. Plaintiffs' approach, however, would protect those who devise policy, but leave defenseless those who execute it. Not only is this distinction unsupported by logic, it makes no sense as a matter of public policy, particularly from an egalitarian point of view. For example, if a construction project manager imposed a policy leaving holes in floors uncovered, it would be both illogical and unjust to insulate the project manager from liability to an employee injured by a resulting fall and yet expose to liability the laborer who actually removed the covering at the employer's direction.

Plaintiffs' proposed personal duty based on direct contact is also flatly inconsistent with all of the Court of Appeals decisions that have applied *Wicken*. Where an employer has assigned a defendant co-employee to carry out the employer's nondelegable duty to provide a safe workplace, the Court of Appeals has uniformly held that the co-employee owed no personal duty to the plaintiff. *Wicklender v. Rarick*, 2003 WL 282384 (Minn. App.) (co-employees "failed to do their jobs") (RA390-92); *Graves v. McConnell*, 2000

WL 719753 (Minn. App.) (high pressure steam released into vault that co-employee mistakenly said decedent had exited) (RA398-401); *Wood v. Korn*, 503 N.W.2d 523 (Minn. App. 1993) (co-employee failed to repair machine that injured plaintiff); *Polzin v. O'Brien*, 1992 WL 95877 (Minn. App.) (co-employees failed to repair truck brakes) (RA409-10); *Weber v. Gerads Devel.*, 442 N.W.2d 807 (Minn. App. 1989) (co-employee mishandled hazardous substance); *Terveer v. Norling Bros. Silo Co.*, 365 N.W.2d 279 (Minn. App. 1985) (co-employee designed scaffold that collapsed); *Nelson v. Rogers Hydraulic, Inc.*, 351 N.W.2d 36 (Minn. App. 1984) (co-employee failed to inspect, guard, or warn about hydraulic press). In nearly all of these cases, the defendant co-employee had direct contact with the plaintiff employee, but in none of them did the Court of Appeals, applying *Dawley* and *Wicken*, find a personal duty as a result of such contact. An employee who *departs* from employment duties and voluntarily assumes additional duties that put another employee at risk as a result stands in a different posture, and may have a personal duty that exposes him to liability. *See, e.g., Swanson v. Timesavers, Inc.*, 1997 WL 104917 (Minn. App.) (supervisor who departed from usual employment role held to have personal duty to plaintiff) (RA402-08). As discussed in the following section, however, that is not the present case.

As the *Wicken* and *Wicklender* courts held, an employee who merely carries out the duties an employer has assigned has no “personal duty” to a co-employee and, under the Workers’ Compensation Act, cannot be held personally liable if an injury results. *See Wicken*, 527 N.W.2d at 98. The protection afforded by the bar to co-employee liability is not as broad as the “course of employment” standard applied elsewhere in the Workers’

Compensation Act, *see, e.g.*, Minn. Stat. § 176.021, subd. 1, because an employee remains within the course of employment as long as the employee's activities are work-related, even they are if not part of the employee's usual work. *See, e.g., Nelson v. Lutheran Mut. Life Ins. Co.*, 311 Minn. 527, 249 N.W.2d 445 (1976) (employee injured during travel for employer). At the same time, the protection is not so narrow that it clothes only executives and office workers, leaving the employees "in the trenches" naked to liability. The Court should reject plaintiffs' proposed "direct contact" standard for personal duty.

C. Zamberletti's and Osterman's Duties Toward Stringer Arose Directly from Their Employment as Vikings Trainers.

Applying the *Wicken* standard here, Zamberletti and Osterman owed no personal duty to Korey Stringer. The only duties they had to Stringer were a direct result of their status as trainers for the Vikings and their efforts to carry out the team's nondelegable duty to provide a safe workplace for Stringer.

1. These trainers were doing exactly what their jobs required..

Here, as in *Dawley* and *Wicken*, the defendants' obligations to Stringer resulted directly from their employment by the Vikings and from the Vikings' efforts to provide a safe workplace for their players. Indeed, the Vikings' very purpose in employing the trainers was to help protect the safety and health of their players. The trainers' duties included monitoring practice, providing players with water at practice, and evaluating and treating player injuries. The team required at least one trainer to remain on the field until the last player had retired. *See* Barta Depo. 77:3-7; 332:16-25 (RA42, 63). The

trainers were a critical part of the team's effort to carry out its nondelegable duty to maintain a safe workplace.

Trainers Zamberletti's and Osterman's relationship with Stringer at the Vikings training camp was a far cry from the "normal daily social contact" that may give rise to a personal duty. *Wicken*, 527 N.W.2d at 98. In a "normal daily social contact," a person who encounters another person suffering from the heat does not have a duty to treat that person for heat stroke, to call an ambulance—indeed, to do any of the 25 things on plaintiffs' expert's list of defendants' claimed failings. *See* Pl. Br. at 26-27. The duties Zamberletti and Osterman owed Stringer were not those that all citizens owe one another every day, but duties unique to and arising directly from Zamberletti's and Osterman's positions as trainers for the Vikings. They were not personal duties but *employment* duties. No one can reasonably dispute that Zamberletti's and Osterman's responsibilities toward Stringer arose solely from their status as employees of the Vikings.

This conclusion is in accord with *Dawley*, with *Wicken*, and with over half a dozen decisions of the Minnesota Court of Appeals that follow those two cases. As discussed in the previous section, in applying this Court's precedent, the intermediate court has consistently found no personal duty in situations where the co-employee was simply doing the job for which the employer had hired the co-employee. *See, e.g., Wicklander v. Rarick*, 2003 WL 282384 (Minn. App. Feb. 5, 2003) ("When the allegations surround claims that the co-employee failed to meet responsibilities arising solely out of that co-employee's employment status, those allegations are subsumed by the exclusivity provision of the workers' compensation statute." citing *Wicken*) (RA390-92).

Despite this Court's and its own precedent, however, the Court of Appeals' dicta on this issue got it wrong. The lower court missed the distinction between a duty owed another as a member of society as part of the social contract and a duty owed another as a result of specific job responsibilities. Instead, the Court of Appeals' mistakenly analogized the trainers' situation to that of a volunteer who "takes charge of or controls the circumstances." See 686 N.W.2d at 551 (citing *Regan v. Stromberg*, 285 N.W.2d 97, 99-100 (Minn. 1979) (husband abandons obviously intoxicated wife at side of highway on winter night) and *Tiedeman ex rel. Tiedeman v. Morgan*, 435 N.W.2d 86, 88 (Minn. App. 1989) (host cancels 911 call for guest suffering chest pain despite knowing history of heart problems). Osterman and Zamberletti, however, were not "volunteers" who stepped in to help because of a personal relationship with Stringer. They intervened as the agents and employees of the Minnesota Vikings, the employer who had the ultimate responsibility to provide Stringer with a safe workplace. Osterman and Zamberletti were not "in charge" and did not "control the circumstances"; their employer did. Their attempts to care for Stringer were "an integral part of [their] employment obligations." *Wicken*, 527 N.W.2d at 99; see also *Dawley*, 231 N.W.2d at 557.

At plaintiffs' urging, the Court of Appeals substantially eroded the bar to co-employee liability by permitting such claims against co-employees whenever a plaintiff characterizes that claim as "not strictly based upon workplace hazards," 686 N.W.2d at 550. The Court of Appeals sought to justify finding a personal duty by noting that plaintiffs "not only contend that Stringer's injuries arose out of an unsafe workplace, but also that respondents failed to identify Stringer's injuries and ensure proper treatment."

686 N.W.2d at 550. Distinguishing workplace risks from the measures taken in the workplace to address those risks, however, is highly artificial and defies any real world approach to workplace safety. The availability of trained personnel and first aid and medical equipment suitable to the circumstances is a crucial part of providing a safe workplace, particularly a workplace like a professional football training camp that involves a considerable risk of various types of injuries. The law recognizes this aspect of an employer's duty. Federal OSHA regulations, for example, require employers to "ensure the ready availability" of medical personnel at workplaces and to provide first aid supplies and a person "adequately trained" in first aid. *See* 29 C.F.R. § 1910.151. Even more compellingly here, the Vikings' provision of the means to *treat* injuries does as much or more to fulfill the team's nondelegable duty to provide a safe workplace as anything that the team does to *prevent* those injuries. It was the Vikings, after all, who required a trainer stay on the field until all players left; that is why Osterman was there. *See* Barta Depo. 77:3-7; 332:16-25 (RA42, 63).

The Court of Appeals decision seems to recognize that an employer who makes a professional athletic trainer available to its employees is fulfilling its duty to provide a safe workplace, but then concludes that any act by that trainer to actually *perform* his job (i.e., identify and treat an injury) is beyond the employer's responsibility and instead imposes a personal duty and consequent liability on the trainer. This distinction flouts logic and invites abuse: virtually any injured employee could assert that a workplace injury was caused or aggravated, not just by the workplace accident, but by a co-employee's failure to timely get medical help or competently apply first aid.

An employee's personal duty to a co-employee must be limited to a scope that is consistent with the goals of the Workers' Compensation statute: Where the employer is immune from civil liability, an employee should not face such liability for simply doing the job that the employer directed the employee to do. *See Nelson v. Rodgers Hydraulic Inc.*, 351 N.W.2d 36, 38 (Minn. App. 1984 ("A shift in tort liability from the employer to another employee was never intended by the legislature.")). If, in contrast, a co-employee departs from the co-employee's usual duties for the employer and voluntarily takes on a new task that poses a risk to the plaintiff, that co-employee may owe a personal duty to the plaintiff. *See, e.g., Swanson v. Timesavers, Inc.*, 1997 WL 104917 (Minn. App.) (RA402-08) (holding co-employee supervisor owed personal duty to plaintiff where co-employee departed from supervisory role and voluntarily took controls of unfamiliar and dangerous machine).

2. Plaintiffs' gross negligence argument undercuts the existence of any personal duty.

Plaintiffs' own argument on the issue of gross negligence (addressed above) in fact demonstrates the professional nature of the duties Zamberletti and Osterman owed to Stringer and thus undermines plaintiffs' position on the existence of a personal duty. First, plaintiffs' repeatedly focus on the fact that Zamberletti and Osterman were trained and experienced professional athletic trainers. *E.g.*, Pl. Br. at 4, 34 (arguing standard of care should be different because of defendants' status as "licensed health care providers" [sic]), 36. The defendants' status as professional athletic trainers, however, was part and parcel of their employment by the Vikings; it was the sole reason they had their jobs.

Plaintiffs themselves characterize Zamberletti and Osterman as “health care providers *duty-bound* to treat a helpless and desperately ill person.” Pl. Br. at 36 (emphasis added). That “duty” is not a personal duty incidental to ordinary social contact; it comes directly from defendants’ employment by the Vikings, and would not exist without that employment. The emphasis plaintiffs put on defendants’ status as professional trainers highlights the striking difference between the professional duties Zamberletti and Osterman owed Stringer by virtue of their employment by the Vikings and the duty that a lay person would owe another as part of “normal daily social contact.” *Wicken*, 527 N.W.2d at 98.

Likewise, many of the factors plaintiffs cite in blaming Zamberletti and Osterman for Stringer’s death go directly to the Vikings’ provision of a safe workplace for its players and coaches. For example, plaintiffs cite the hot conditions on the practice field, the decision to hold practice in full pads, and the limited availability of water, a cool environment, and medical care as contributors to Stringer’s heat stroke. Pl. Br. at 6-10. Assuming that Zamberletti and Osterman had any control over these elements at all (which the evidence refutes), the trainers were simply carrying out the team’s nondelegable duty to provide that safe workplace.

Plaintiffs’ own arguments on gross negligence thus undercut the conclusion that Zamberletti and Osterman owed Stringer a personal rather than a professional duty.

3. Legislative intent and public policy require a narrow “personal duty” exception to co-employee immunity.

As noted above, Minnesota’s workers’ compensation system represents a careful balance among competing interests, and co-employee immunity is a crucial part of that balance. The Court of Appeals’ dicta on personal duty would, if adopted, substantially expand co-employees’ tort exposure, upset that balance, and thwart the goals of the system. As this Court stated in *Wicken*:

[P]ermitting co-employee liability when harm results however indirectly from the carrying out of administrative obligations incident to work responsibilities would eviscerate the fundamental purpose of the workers’ compensation laws.

527 N.W.2d at 99. Expanding co-employee liability would also run directly contrary to the legislature’s intent:

To allow an employee to sue his fellow worker for negligence and thus permit his employer to be reimbursed from the recovery for workers’ compensation benefits already paid is “to shift tort liability from employer to fellow employee in a manner never intended by the workers’ compensation system.”

Peterson v. Kludt, 317 N.W.2d 43, 48 (Minn. 1982) (quoting Minnesota Workers’ Compensation Study Commission, a Report to the Minnesota Legislature and Governor, 41 (1979)).

Expanding co-employee liability by broadening the personal duty would move state policy in exactly the wrong direction. Both of the states on whose case law this Court relied for the “personal duty” holding in *Dawley*, Louisiana and South Dakota, have since amended their workers’ compensation to eliminate *any* co-employee liability

other than for an intentional tort. See *Dawley*, 231 N.W.2d at 557-58 (citing Louisiana and South Dakota cases); *Walls v. American Optical Corp.*, 740 So.2d 1262, 1265 (La. 1999) (noting statutory elimination of co-employee liability); *Canal Ins. Co. v. Abraham*, 598 N.W.2d 512, 518 n.5 (S.D. 1999) (same). In addition, as the Court of Appeals here observed, “[o]nly two other states, Florida and Iowa, currently extend immunity to co-employees but provide an exemption for some form of negligence.” 686 N.W.2d at 550 n.2.

Enlarging co-employee liability would also introduce numerous new and potentially vexing issues into the legal mix. For example, what is the obligation of an employer to defend or indemnify an employee who is just doing the job the employer requires but nonetheless is held to have a “personal duty” to an injured co-employee? May an employer—for whom liability for an employee’s work-related injury is “exclusive” under the Workers’ Compensation Act, see Minn. Stat. § 176.031, and who can face tort liability only for an intentional injury, not gross negligence—be required to indemnify an employee found liable for that same injury under a gross negligence standard.

What about insurance? Many employers’ policies have exclusions for injuries resulting from acts of co-employees, meaning that either an indemnifying employer will face an uninsured loss or that an unindemnified employee will face personal liability for carrying out employment duties.

On the other side of the coin, Minnesota’s workers’ compensation law provides that an employer that has paid worker’s compensation benefits is entitled to a subrogated

claim against a third party (that is, a party not protected by the Workers' Compensation statute) who is liable for the plaintiff's injuries. *See* Minn. Stat. § 176.061, subs. 3, 5. Here, if the Court holds that a plaintiff's injury arises from a co-employee's violation of a personal duty (despite arising directly from the co-employee's job duties) and is thus outside the Workers' Compensation statute, the co-employee would be a third party potentially subject to such a subrogation claim. Plaintiffs' approach would thus produce the anomalous result that the employer would have a subrogation interest for the workers' compensation benefits it paid to the plaintiff against its own employee *for doing exactly what the employer hired employed the employee to do*. Neither the statute nor this Court's prior case law suggests such an absurd result.

Finally, broadening the co-employee's "personal duty" to include the co-employee's performance of employment duties would create enormous practical problems in litigating such cases. These problems would increase the possibility that a co-employee will be held liable at trial, not only for the employee's own fault, but for the employer's fault as well. For example, plaintiffs here allege that Stringer's death resulted from a combination of an unsafe workplace (the temperature, the field conditions, the full-pad practice), *see* Pl. Br. at 6-10, and the acts or omissions of defendants, *e.g.*, Pl. Br. at 18-19. *See* 686 N.W.2d at 550 (noting plaintiffs "not only contend that Stringer's injuries arose out of an unsafe workplace, but also that respondents failed to identify Stringer's injuries and ensure proper treatment."). However, if an injury arose in part from the employer's failure to provide a safe workplace (for which plaintiffs now concede a co-employee may not be held liable) and in part from a co-employee's breach

of a personal duty arising out of the co-employee's work for the employer, how could a court ever effectively limit the evidence at trial to that which properly goes to the personal duty alone? And how could a court effectively instruct the jury how to distinguish between that causative conduct of the co-employee that the jury may consider as the co-employee's fault, and that causative conduct that it may not?

Would a court allocate fault between co-employee and employer as set out in Minn. Stat. § 604.01? If so, what happens to the employer's "uncollectible share" under § 604.02? Does the co-employee pay it, as an ordinary joint tortfeasor would, or does the plaintiff absorb the fault, in a sort of pseudo-*Pierringer* approach? Neither result is satisfactory. If a plaintiff can get to a jury simply by claiming that the injury at issue is "not strictly based upon workplace hazards," 686 N.W.2d at 550, the door would almost certainly be open to holding the co-employee financially liable for the employer's failure to maintain a safe workplace, despite the well-established principle that this is the employer's nondelegable duty.

In sum, the application of the "personal duty" standard urged by plaintiffs and suggested by the Court of Appeals' dicta finds no support as a matter of either policy or practicality. This is not surprising. In eleven of the twelve Minnesota appellate decisions that have addressed the claimed tort liability of a co-employee, the co-employee has received judgment as a matter of law. *See* Judge Larson's Order at 55-56 (collecting cases) (A126-127). Likewise here, plaintiffs have failed to meet either the gross negligence or the personal duty requirement, and this Court should affirm the dismissal as a matter of law.

CONCLUSION

For the reasons discussed above, respondents Fred Zamberletti and Paul Osterman urge this Court to affirm the judgment of the district court and the decision of the Minnesota Court of Appeals.

Dated: January 24, 2005

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STATE OF MINNESOTA
IN SUPREME COURT

KELCI STRINGER, individually and as
Personal Representative of the Estate of
Korey Stringer, and as Trustee for the
Heirs and Next-of-Kin of Korey Stringer,
and KODIE STRINGER, a Minor,
through his Parent and Natural Guardian,
Kelci Stringer, and CATHY REED-
STRINGER and JAMES STRINGER,

Plaintiff/Appellants,

vs.

MINNESOTA VIKINGS FOOTBALL
CLUB, LLC, and FRED ZAMBERLETTI
and CHUCK BARTA and PAUL
OSTERMAN,

Defendants/Respondents,

and

DENNIS GREEN and MICHAEL TICE
and W. DAVID KNOWLES, MD and
MANKATO CLINIC, LTD. and
SHELDON BURNS, MD, and DAVID
FISCHER, MD, and ORTHOPAEDIC
CONSULTANTS, PA, and EDINA
FAMILY PHYSICIANS, a professional
association, and JOHN DOES and JOHN
DOES 6 THROUGH 30, Natural Persons
or Entities Whose Names or Identities are
Unknown to Plaintiff,

Defendants

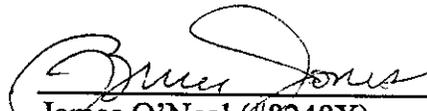
CERTIFICATION OF
BRIEF LENGTH

Appellate Court
Case Numbers: A03-1635 and A04-205

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App.

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